BRIEF IN SUPPORT OF PETITION

POINT I

The Court below has decided an important question of local New York law in a way in conflict with applicable local decisions.

A. The decision sought to be reviewed is in conflict with the local law of New York, as set forth in specifically applicable statutes.

The assignability of a chose in action is covered by Section 41 of the Personal Property Law of the State of New York. Under subdivision 3 thereof a transfer of a claim passes any interest which the transferee may enforce by an action in his name as the transferor might have done "subject to any defense or counter-claim * * * against the transferee."

Under Section 210 of the New York Civil Practice Act the assignee is the only one who may sue on the claim (*Foster* v. *Central National Bank,* 183 N. Y., 379, 384). The question of what happens where a claim is assigned after an action has been commenced is covered by Section 83 of the Civil Practice Act, which provides:

> "*Proceedings upon transfer of interest, or devolution of liability.* In case of a transfer of interest, or devolution of liability, the action may be continued by or against the original party, unless the court directs the person to whom the interest is transferred or upon whom the liability is devolved to be substituted in the action or joined with the original party as the case requires."

In this case the action started by the Brooklyn National Bank could have been prosecuted to judgment by it, or Fox

could have been substituted by order of the court in place of the bank, or Fox could have been joined by court order as a party plaintiff. None of these three methods of procedure was followed. The section was completely ignored, although its provisions are mandatory and specifically applicable to the situation involved in this case. There was no mistake by Fox. He deliberately entered a judgment in his own name.

Under Section 87 of the Civil Practice Act, if the assignee applies in his own behalf, the court "may" direct that he be made a party by amendment of the pleadings or otherwise, as the case requires. If the plaintiff makes the application to bring in an assignee as a defendant, the court can direct that a supplemental summons and pleading be issued. This provision of the New York statutes was likewise ignored by Fox and there was never any opportunity for the University to enter any defense or counter-claim against the assignee or question the assignment.

The New York statutes also have specific provision for the entry of a judgment on default by the Clerk in a case such as this. Under Section 485 of the Civil Practice Act the Clerk could have entered judgment for the bank. Sections 485-487 of the Civil Practice Act make it obvious that judgment may be entered only in favor of a named plaintiff, in favor of a party to the action. The power of the Clerk is specifically limited to the procedure set forth in these sections.

The Circuit Court rested its decision on the provisions of Section 109 (12) and Section 105 of the Civil Practice Act, which provide for correction of errors or mistakes. These sections do not cover jurisdictional defects, and it is respectfully submitted that the District Court was correct when it held in its opinion that Section 109 is not applicable. The District Court pointed out in its decision:

> "That section relates to the act of entering a judgment with authority and mere irregularity does

not void a judgment entered pursuant to this section. A careful reading of the language of this section indicates clearly that it does not cover a situation or a state of facts where there has been a transfer of interest or devolution of liability. A review of the decisions of the said court indicates that clearly. Where there is such a transfer of interest, as in the instant case, the procedure laid down under *Section 83* must be followed." (Record 5a)

Where a judgment is entered in favor of a party over whom the court never had jurisdiction, who is an absolute stranger to the action and has never been made a party by court order as required by specific statutes, there is a basic jurisdictional defect. A specific procedural pattern, involving substantial rights, is statutorily established in New York and the decision of the Circuit Court discards it. The court below validated a judgment where there was an absolute lack of power to enter it.

B. The decision sought to be reviewed is in conflict with the local New York law by denying a defendant the right to contest an assignment.

The highest court of New York has held that when an assignee seeks to be substituted in an action he must give notice to the defendant. (*Smith* v. *Zalinski*, 94 N. Y. 519; 522). Defendant has the right to contest the title of the transferee. Id. 521-2. If defendant dispute the assignment, he is given a chance to contest the new ownership. The Court may decide it on the motion or direct the issue to be carried over to the trial. In the latter situation defendant would be entitled to a trial by jury. Id. 523. When the motion to substitute is granted, it is a binding adjudication. Id. 521. Furthermore, under Section 41, subdivision 3, of the Personal Property Law, defendant has the right to assert a defense or counter-claim against the transferee.

All these rights and privileges, the Clerk at the instance of Fox, has swept away with an assertion of power beyond that held by the Court itself, for he has even passed upon the validity of the assignment without notice to the debtor. It makes no difference whether or not the debtor had any defense to the assignment or had any counter-claim, the fact remains that the County Clerk has not only attempted to usurp the functions of the Court but has exceeded them. This radical, unauthorized action cannot be characterized as an irregularity, when it cuts off the substantial right to defend and counter-claim.

It is respectfully submitted that the decision of the Circuit Court denied due process by denying a day in court to contest the assignment and defend against the assignee. More than protection against a possible double claim is involved in the ruling in *Smith* v. *Zalinski*. The cause of action on which judgment was entered was a simple claim in favor of the bank. The only claim Fox had was by virtue of his assignment and the defendant never had an opportunity to contest that claim, because no pleading was ever filed that recited the assignment and no motion was ever made that would have raised the question of the assignment and permitted the defendant to have its day in court with respect to the assignment. Both the parties and the cause of action were changed by the act of Fox. The Court had no jurisdiction of either Fox or the changed subject matter of the action.

C. The decision sought to be reviewed is in conflict with the decisions of the courts of New York holding that in a case, such as this, involving a matter of substance and power, a jurisdictional defect exists and the judgment is a nullity.

It is respectfully submitted that on the facts of this case the Clerk had no power to enter the judgment and a jurisdictional defect exists. The Clerk is a purely ministerial officer and has only the power conferred upon him by statute. Before he can enter a judgment everything

essential to his jurisdiction must appear or else his act is void.

3 Freeman on Judgments, 5th ed. Secs. 1280, 1283;
1 id. Sec. 47, p. 78;
1 Black on Judgments, 2nd ed. Sec. 88;
Bouker Contracting Co. v. *Neale,* 161 App. Div. 617 (2nd Dept.);
Shorer v. *T. P. & P. Co.,* 119 N. Y. 483;
Stock v. *Mann,* 255 N. Y. 100.

In the *Bouker Contracting Co.* case, cited above, where the Clerk had power only to enter judgment in a contract action, and the complaint joined causes of action in tort and contract, it was held that the judgment was a nullity and absolutely void.

In the *Shorer* case, cited above, where an order required by the statute to interpose an answer was lacking, the Clerk was held to have exceeded his powers and the judgment was deemed a nullity.

In the case of *Cartier* v. *Spooner,* 118 App. Div. 342, where there was a reference to hear and report, and the Court never confirmed the report, it was held that the Clerk had no authority to enter a judgment and that a judgment under such facts was a nullity.

In *Greenfield* v. *Greenfield,* 215 App. Div. 504, a judgment was vacated for lack of power of the Clerk where it was entered on a stipulation of the parties in a separation action.

In *Christal* v. *55 Columbus Corp.,* 168 Misc. 118, where the defendant defaulted and an affidavit required by the statutes was lacking, the judgment was vacated even though there was no legal excuse for the default.

In *Fidelity & Casualty Co.* v. *Marendino,* 202 App. Div. 24, where a judgment was entered on a confession, it was held that it must be vacated as having been entered without authority, the court saying at page 26 of its opinion:

> "If there was no authority for the entry of judgment upon the confession, the judgment should not have

> been entered and is void. There is a vast distinction between an irregularity and a void judgment; an irregularity may be cured, but a void judgment cannot stand."

It is respectfully submitted that the doctrine of the leading New York case of *Herpe* v. *Herpe*, 225 N. Y. 323 is in conflict with the decision of the Circuit Court in this case. The New York Court of Appeals in its decision in the *Herpe* case held that where substantial rights of a party are involved, a judgment is not susceptible of correction by amendment. The court said at page 327 of its opinion:

> "Clerical errors or a mistake in the entry of the judgment or the omission of a right or relief to which a party is entitled as a matter of course may alone be corrected by the trial court through an amendment."

The doctrine of the *Herpe* case has been consistently followed by the courts in New York State since it was first enunciated. Under that decision, amendment is not permissible unless there is a clerical error or a mistake in the entry of judgment or the omission of a right or relief to which a party is entitled as a matter of course. As in the *Herpe* case, the flaw in the Fox judgment does not come within the class of defects and mistakes that are curable by amendment as a matter of course. The substantial rights of the parties were involved in the entry of judgment in favor of one who was not a party to the action based upon title to a claim that was in no way involved in the complaint in the action and was never raised by motion. The granting of a judgment to one not a party to the action is certainly as much a "substantive part of a judgment" as the matter of awarding costs in an equity action, the problem in the *Herpe* case.

It is respectfully submitted that a substantial right was affected and a fundamental lack of power existed on the facts of this case. The decision of the Circuit Court in

ruling that only a mere irregularity or mistake was involved, conflicts with the applicable local decisions of the New York courts cited above.

CONCLUSION

The petition for a writ of certiorari should be granted since the Court below has decided an important question of New York law in a way in conflict with applicable local decisions.

Respectfully submitted,

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